4-610

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 229.

THE NEW JERSEY MUTUAL LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

ANSON M. BAKER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NOTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 4, 1874.

1

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1 United States circuit court, northern district of New York.

Pleas before the judges of the circuit court of the United States of America for the northern district of New York, at the village of Canandaigua, at the June term of said court, held at said village, on the third Tuesday of June, A. D. 1873.

Witness the honorable Ward Hunt, justice.

CHARLES MASON, *Clerk.*

NORTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that at the June term of said circuit court, held at the village of Canandaigua, on the 17th day of June, 1873, came The New Jersey Mutual Life Insurance Company, by L. A. Hayward, its attorney, and filed in said circuit court certified copies of the summons and complaint, amended answer, order and notice of appeal, and order removing the cause entitled "Anson M. Baker vs. The New Jersey Mutual Life Insurance Company" from and out of the supreme court of the State of New York into this court.

2 Whereupon an order was entered docketing said cause in said circuit court: which said copy of summons and complaint, amended answer, order and notice of appeal, and order removing cause, and order docketing cause, were and are in the words and figures following, to wit:

3 STATE OF NEW YORK,
Supreme Court, County of Livingston:

ANSON M. BAKER
vs.
THE NEW JERSEY MUTUAL LIFE INSURANCE Company. } Sum'ons.

To the New Jersey Mutual Life Insurance Company, defendant:

You are hereby summoned to answer the complaint of Anson M. Baker, plaintiff, a copy of which is herewith served upon you, and to serve a copy of your answer on the subscribers at their office in Mt. Morris, Liv. Co., N. Y., within twenty days after the service of this summons, exclusive of the day of service, or the plaintiff will take judgment against you for ten thousand dollars, and with interest, besides costs.

BINGHAM & STEVENS,
Plaintiff's Attorney.

4 LIVINGSTON COUNTY, *ss:*

George W. Burt, being duly sworn, says, that on the 30th day of May, 1872, in the city of Rochester, county of Monroe, he personally served the within summons, and the complaint hereto annexed, on Philander M. Crandall, whom deponent personally knew to be an agent of the New Jersey Mutual Life Insurance Company, the defendant herein, by handing to, and leaving with him, the said Crandall, a true copy of the said summons and complaint. Deponent further says that there is no person designated by the said defendant in the county of Livingston, nor in any county in the State of New York, on whom process may be served in persuance of the statute providing for the serving of process in foreign corporations.

GEO. W. BURT.

1 United States circuit court, northern district of New York.

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Witness the honorable Ward Hunt, justice.

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BINGHAM & STEVENS,
Plaintiff's Attorney.

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GEO. W. BURT.

Subscribed and sworn to be me this 3rd day of June, 1872.
H. E. BROWN,
Notary Public.

Copy.

5 Supreme court, Livingston County.

ANSON M. BAKER
vs.
THE NEW JERSEY MUTUAL LIFE INSURANCE Company.

The plaintiff in this action, Anson M. Baker, complains of the defendant, and alleges:

That the defendant is an incorporated company, duly incorporated under and by virtue of the laws of the State of New Jersey, duly enacted by the legislature of said State, relating to the incorporation of life-insurance companies, and doing a general life-insurance business; that the principal office of said company is located at Newark, in the State of New Jersey; that the said company for five years last past has been engaged in conducting and prosecuting its general business of life-insurance within the State of New York, in pursuance of the several acts of the legislature of said State authorizing and providing for the transacting of business within the State of New York by
6 foreign insurance companies; that the plaintiff is a resident of the State of New York, and was a resident of such State at the time of the making and execution by the defendant of the contract of assurance hereinafter specified, and that said contract was made by the plaintiff with the defendants at Mount Morris, Livingston County, New York, and delivered to said plaintiff, at said village of Mount Morris, New York; that on the 28th day of June, eighteen hundred sixty-nine, the defendant, in consideration of the payment to it of four hundred twelve dollars and twenty cents at the time of issuing its policy of insurance as hereinafter set forth, and of the annual payment to it of four hundred twelve dollars and twenty cents on or before the 18th day of June, in every year during the continuance of said policy, executed to the plaintiff and one Martha C. Baker, the wife of the plaintiff, jointly, a policy of insurance on the life of the said parties, whereby they promised and agreed to and with the said plaintiff and the said Martha C. Baker, to pay the sum of ten thousand dollars
7 at their office in the city of Newark, to the survivor at the death of either party of the said assured, or their legal representatives, in ninety days after due notice and proof of the death of the said party or parties; that the plaintiff had a valuable interest in the life of the said Martha C. Baker at the time affecting the said policy of insurance, and at the time of her death; that on the sixth day of December, 1870, at East Avon, in the county of Livingston, the said Martha C. Baker died; that on the first day of June, 1871, or thereabouts, the plaintiff furnished the defendant proof of the death of the said Martha C. Baker, and otherwise duly performed all the conditions of said party on his part; that payment of the said sum of ten thousand dollars was duly demanded of the said defendant by the plaintiff, but the said defendant has not paid the sum, nor any part thereof; and there is due the plaintiff, upon said contract, the sum of ten thousand dollars, and interest from the first day of September, 1871; for which amount the plaintiff demands judgment, besides costs.

BINGHAM & STEVENS,
Pl'ff's Attys.

8 LIVINGSTON COUNTY, *ss:*

Anson M. Baker, being duly sworn, says that he is the plaintiff named in the foregoing complaint; that he knows the contents of the foregoing complaint, and that the same is true of his own knowledge, except as to those matters therein stated on his information and belief, and as to those matters he beli'ves it to be true.

ANSON M. BAKER.

Subscribed and sworn to before me this 29th day of May, 1872.

MOSES CAMP,
Justice of the Peace.

Copy. Filed May 28th, 1873.

9, 10 STATE OF NEW YORK,
Livingston County, Clerk's Office, Geneseo, N. Y., ss:

I hereby certify that I have compared the foregoing with a summons and complaint in the above-entitled action now on file in said office, and that the same is a true copy thereof, and of the whole of said summons and complaint.

Witness my hand and the seal of said county this 28th day of May, 1873.

[L. S.]

N. A. GEARHART, *Clerk*,
By S. B. HOWE, *Deputy.*

Fee, 75 ct.

11, 12 Supreme Court, special term, Rochester, October 2d, 1872, Hon. James C. Smith presiding.

ANSON M. BAKER
vs.
THE NEW JERSEY MUTUAL LIFE INSURANCE Company.

Motion by defendants for an order transfer'ing the cause to the circuit court of the United States.

On reading and filing affidavits of respective parties used on said motion, and after hearing of counsel—L. A. Hayward, esq., for defendants; A. M. Bingham, for plaintiff—

Ordered, that the motion be denied, with ten dollars costs against the defendants.

(Endorsed:) Monroe special term, October 2d, 1872. Granted and ordered entered in Livingston County. R. D. Jones, sp. dep. clerk. Filed 18 Nov., 1872.

13, 14 Supreme court, Livingston County.

ANSON M. BAKER
agt.
THE NEW JERSEY MUTUAL LIFE INSURANCE Company.

Take notice that the defendant in the above-entitled action appeals to the general term of this court from the order entered herein, in the

clerk's office of the county of Livingston, on the 18th day of November, 1872, which order denied, with $10 costs, the motion made by the defendant at special term, that this action be transfer'ed to the circuit court of the United States.

November 25, 1872.

L. A. HAYWARD,
Attorney for Defendant.

To N. A. GEARHART,
County Clerk Livingston Co.

Filed November 27, 1872.

15 Supreme court, State of New York.

At a general term the supreme court, fourth judicial department, held at the court-house in the city of Rochester, Monroe county, on the 24 day of April, 1873:

Present, Hon. Joseph Mullin, presiding justice, Hon John L. Talcott, Hon. E. Darwin Smith, associate justices.

ANSON M. BAKER, RESPT.,
vs.
NEW JERSEY MUTUAL LIFE INS. CO., APPLT.

Order reversed, and cause ordered to be removed into the circuit court of the United States, with $10 costs.

R. D. JONES,
Sp. Dep. Clerk.

(Copy.)

16 Supreme court, State of New York.

At a general term of the supreme court, fourth judicial department, held at the court-house in the city of Rochester, Monroe county, April 24, 1873:

Present, Hon. Joseph Mullin, pres. justice, John L. Talcott, E. Darwin Smith.

ANSON M. BAKER, RESPT.,
agt.
NEW JERSEY MUTUAL LIFE INS. COM'Y, APPLT.

A petition having been filed by the defendant in this action praying for the removal of the said action to the circuit court of the United States for the northern district of New York, pursuant to the law of Congress in such case made and provided, and the said petitioner having offered good and sufficient security in pursuance of and as required by said law, upon which a motion was made, at a special term of the supreme court held at the court-house in the city of Rochester, at the September term thereof, in the year 1872, Justice James C. Smith
17, 18 presiding, that the said action be removed to the circuit court of the United States, as asked for in the said petition; which motion was denied, with $10 costs, from which order the said defendant appealed to this court;

And the motion on said appeal being brought to a hearing at the present term of this court, Messrs. L. A. Hayward and P. M. Crandall

appearing for the defendant in said action and A. M. Bingham for the plaintiff:

Now, on motion of L. A. Hayward, counsel for the defendant, it is ordered that the order made in said action at special term be reversed, with $10 costs against the said plaintiff; that the said security be accepted, and the action be removed for trial into the circuit court of the United States for the northern district of New York, pursuant to the said law of Congress, and that the supreme court of the State of New York proceed no further therein, and that the clerk of Livingston County transmit to the said circuit court of the United States certified copies of the process or papers by which the suit was commenced in the State court and of the pleadings therein, with a certified copy of this order, and of such other papers as may be necessary.

Filed May 7, 1873.

19 Supreme court, Livingston County.

ANSON M. BAKER
agt.
THE NEW JERSEY MUTUAL LIFE INSURANCE Company.

The defendant in the above-entitled action, for an amended answer to the complaint of the plaintiff therein, alleges as follows:

The defendant admits the allegations of the complaint, except as hereinafter modified, and except the allegation that the plaintiff duly performed all the conditions of the said policy of insurance on his part, as to which conditions defendant says that the said plaintiff and Martha C. Baker, as defendant is informed and verily believes, failed to perform the same, by concealing and with'olding certain information, as hereinafter set forth.

The defendant also admits that the payment of the sum of $412.20 at the time of issuing said policy of insurance, and the agreement to pay annual premium of a like amount, as alleged in the said complaint, form a part of the consideration upon which said policy of insurance was issued; but defendant denies that it is the whole consideration ex-
20 pressed in said policy, but alleges that said consideration is as follows: in consideration of the representations made in the application therefor, and of the sum of $412.20 duly paid, and of the an'ual payment of a like amount to be paid in every year during the continuance of the policy.

2. And the defendant alleges, as matter constituting a defense to the said action, that on the 18th day of June, 1869, and before the procuring of the policy of insurance mentioned in the said complaint, the said plaintiff and the said Martha C. Baker, in order to induce the defendant to issue the said policy, made an application therefor, in print and in writing, in which they made certain statements, and gave certain answers to questions propounded by the defendant and in its behalf; that in a declaration accompanying such application it was stated that in the above proposal there had been nothing withheld touching the past or present state of health or habits of life of Martha C. Baker with which the New Jersey Life Insurance Company ought to be made acquainted in order to effect this insurance; and it was also
21 declared that the above were fair and true answers to the foregoing questions; and it was also therein acknowledged and

agreed, by the said plaintiff and Martha C. Baker, that the above statements should form the basis of the contract for assurance, and also that any untrue or fraudulent answers, or any suppression of facts in regard to the person's health, would render the policy null and void.

And the defendant afterwards, relying upon the facts and circumstances stated in the said application, and believing the same to be true, was induced thereby to subscribe and issue the policy and become insurer, as alleged in the said complaint, wherein and whereby it agreed to insure the joint lives of the said parties, expressly in consideration of the representations made in the application therefor and of the sum $412,20 paid, and a like sum to be annually paid thereafter. And it was therein also declared that the said policy was issued and accepted by the assured upon the express condition and agreement (among others) that if any of the statements or declarations made in
22 the application for the said policy, upon the faith of which the said policy was issued, and which were to be deemed a part thereof, should be found in any respect untrue, then, and in every such case, the said policy should be null and void.

And the defendant alleges that many of said answers and statements contained in said application were not fair nor true, as defendant is informed and verily believes; that there were therein withheld material circumstances touching the health of the said Martha C. Baker, and of her relatives, with which the said defendant ought to have been made acquainted in order to effect the said insurance; and the conditions of the agreement made and entered into on the part of the plaintiff and the said Martha C. Baker, as above set forth, were violated and broken in the following mentioned particulars:

1. To the question, "What members of the family of said Martha C. Baker (parents, brothers, sisters, or children) have died of, or been afflicted with, pulmonary consumption, insanity, epilepsy, disease of the
23 heart, scrofula, or any other hereditary disease?" the answer was given in said application, "I know of none;" whereas the said plaintiff and Martha C. Baker knew, or had reasonable ground to believe, that the mother of the said Martha C. Baker, Mrs. Dana, whose given name is unknown, for some time before her death was afflicted with pulmonary consumption, and that she died of that disease before the date of the said application; also, that William L. Dana, a brother of the said Martha C. Baker, for several months before his death, was afflicted with pulmonary consumption, and that he died of that disease before the date of the said application; that I. Edward Dana, a brother of the said Martha C. Baker, for several months before his death was afflicted with pulmonary consumption, and that de died of that disease before the date of the said application; that H. Eliza Ann Dana, a sister of the said Martha C. Baker, for several months before her death was afflicted with pulmonary consumption, and that she died of that disease before the date of the said application; that Laura Eunice Clapp, a sister of the said Martha C. Baker, for several weeks be-
24 fore her death was afflicted with pulmonary consumption, and that she died of that disease before the date of the said application; that Margaret Ellen Keith, a sister of the said Martha C. Baker, for some weeks before her death was afflicted with pulmonary consumption, and that she died of that disease before the date of the said application; and also that Almira E. Cookingham, a sister of the said Martha C. Baker, for several months before and at the date of said application, was afflicted with pulmonary consumption.

2. It was alleged that the mother of the said Martha C. Baker, Mrs.

Dana, whose given name is unknown, was deceased, and to the inquiry, "What was the cause of her death?" the answer given in said application was, "Child-birth;" whereas she died of consumption in the month of January, in the year 1842.

3. It was alleged that a brother of the said Martha C. Baker had died at the age of 34, and to the enquiry of what disease he died, the answer given in said application was, "Can't say;" whereas the brother referred to, as defendant is informed and believes, was William L.
25 Dana, who died of pulmonary consumption at or ab'ut the age named, in the city of Milwaukee, in the State of Wisconsin, in the month of April, in the year 1864, under the attendance of one Doctor O. P. Wolcott as his physician. And the defendant alleges that the said plaintiff and Martha C. Baker knew, or had reason to believe, that the said brother died of *plu*monary consumption, and so knowing, or having reason to believe such was the fact, fraudulently concealed the same from the said defendant.

4. It was alleged that a brother of the said Martha C. Baker had died at the age of 21, and to the enquiry of what disease he died, the answer in said application was, "Don't know; far away;" whereas the brother referred to, as defendant is informed, and verily believes, was I. Edward Dana, who died of pulmonary consumption, in the State of Florida, in the month of February, in the year 1842; and the said plaintiff and Martha C. Baker knew or had reason to believe that the said brother died of pulmonary consumption, and so knowing, or having reason to believe such to be the fact, fraud'ently concealed the same from the said defendant.

26 5. It was alleged that a sister of the said Martha C. Baker had died at the age of 35, of typhoid fever; whereas, as defendant is informed and believes, the sister referred to was Margaret Ellen Keith, who died of pulmonary consumption at about that age, in the town of Avon, in the county of Livingston, and State of New York, in the month of June, 1868, under the attendance of one Doctor S. N. Brayton as her physician.

6. It was alleged that a sister of the said Martha C. Baker had died at the age of 39, of bilious fever; whereas the sister referred to, as defendant is informed and believes, was Laura Eunice Clapp, who died of *plu*monary consumption at about that age, in Onondago County, in the State of New York, in September or October, in the year 1868, having been attended in her last sickness by one Doctor Lyman Clary as her physician.

7. It was alleged that a sister of the said Martha C. Baker had died at the age of 14, of puberty; whereas the sister referred to, as defendant is informed and believes, was H. Eliza Ann Dana, who died of pulmonary consumption in Madison County, in the State of New York, in the month of December, in the year 1839.

27 8. To the inquiry, "Has the party been afflicted since childhood with rupture, fits, habitual cough, (and other diseases enumerated;) if so, which?" the answer was given in said application, "No;" whereas during several weeks preceeding the date of said application she had been afflicted with habitual cough.

9. It was alleged that the said Martha C. Baker had not been afflicted during the last ten years with any severe or constitutional disease; whereas in the months of October and November, in the year 1866, at the residence of the plaintiff, in the county of Madison, she was severely ill for some time, and had dysentery with fever, and was attended in said illness by one Doctor L. P. Greenwood as her physician.

10. It was stated that the said Martha C. Baker was then in good health, and was not afflicted with any disease or disorder; whereas during several months previous to the date of said application she was afflicted with pulmonary disease, and exhibited signs and had symptoms of consumption.

11. To the enquiry for the name and residence of the party's usual medical attendant, or of the medical attendant of her family, to
28 be referred to for information as to her health, the answer given in said application was, "Has none;" whereas Doctor Levi P. Greenwood was her usual medical attendant, and had attended her in an illness with which she was visited in the months of October and November, in the year 1866, and was consulted with by her after the date of said application in the month of May, 1870.

Wherefore the defendant askes the judgment of this court, that the said policy of insuarance be declared void and be cancelled, and the plaintiff's complaint be dismissed, with costs of this action.

L. A. HAYWARD,
Defendant's Attorney.

29, 30 CITY AND COUNTY OF NEW YORK, *ss:*

William E. Plummer, of the city of Brooklyn, in the State of New York, being duly sworn, says, that the New Jersey Mutual Life Insurance Company is a corporation duly organized under and by virtue of the laws of the State of New Jersey, and having its principal office in the city of Newark, in said State; that he is the president and chief executive officer thereof, and has read the foregoing answer made by the said company in the action in which Anson M. Baker is plaintiff and the said life insurance company is defendant, and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters he believes it to be true.

WILLIAM E. PLUMMER,
President New Jersey M. Life Ins. Company.

Subscribed and sworn to before me this 24th day of February, 1873.

DAVID I. NOYES,
Notary Public, New York City.

Filed May 17, 1873.

31 STATE OF NEW YORK,
Livingston County, Clerk's Office, Geneseo, N. Y., ss:

I hereby certify that I have compared the foregoing with an original summons and complaint, amended answer, order, and notice of appeal, and order for removal of cause to circuit court of United States, in the above-entitled action, now on file in said office, and that the same is a true copy thereof, and of the whole of said or'ginals.

In witness whereof I have hereunto set my hand and affixed the seal of said county, at Geneseo, this 23d day of May, A. D. 1873.

[L. S.] N. H. GEARHART, *Clerk.*

Fee, $5.75.

32 (Indorsed:) Circuit court of U. S., north. dist. of N. York. Anson M. Baker v. The New Jersey Mutual Life Ins. Company. Certified copy of papers from State court. L. A. Hayward, Warsaw, N. Y., atty. for defendant. Filed June 17, 1873.

33, 34 At stated term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the village of Cananda'gua, on Tuesday, the 17th day of June, in the year of our Lord one thousand eight hundred and seventy-three:

Present, the honorable Ward Hunt, justice.

ANSON M. BAKER
vs.
THE NEW JERSEY MUTUAL LIFE INSURANCE Company.

On reading and filing certified copies of the process, pleadings, and proceedings in this cause, and a certified copy of the order removing this cause from the supreme court of the State of New York into this court, ordered that this cause be entered on the law-docket of this court, and be proceeded in as if it had been commenced here by original

35, 36 process.

And there*fore* the issue above joined came on to be tried at the October term of said circuit court, held at the city-hall in the city of Albany, on the 15th, 16th, 17th days of October, 1873, before the honorable Lewis B. Woodruff, judge, and a jury, at which day and place last aforesaid, by their attorneys aforesaid, and the jurers of the jury summoned to try the said issue being empannelled and sworn, after hearing the evidence offered in said cause, say, upon their oath, that the said defendant is guilty of the premises above laid to its charge in manner and form as the said plaintiff hath above complained against it; and they assess the damages of the said plaintiff by reason of the premises, over and above his costs and charges by him about his suit in this behalf expended, to eleven thousand four hundred and eighty-seven dollars and forty-nine cents.

37, 38 At a stated term of circuit court of the United States of America for the northern district of New York, in the second circuit, held at the city-hall in the city of Albany, on Friday, the 17th day of October, in the year of our Lord one thousand eight hundred seventy-three:

Present, the honorable Lewis B. Woodruff, judge.

ANSON M. BAKER
vs.
THE NEW JERSEY MUTUAL LIFE INSURANCE Company.

On hearing L. A. Hayward, attorney for the defendant in the above-entitled action, and A. M. Bingham, attorney for the plaintiff, it is ordered that the defendant have leave to make a case therein, and change the same into a bill of exceptions, and the judgment in said case be stayed for thirty days.

39 Therefore it is considered that the said plaintiff, Anson M. Baker, do recover of the said defendant, The New Jersey Mutual Life Insurance Company, his said damages by the jur*res* aforesaid in form aforesaid assessed, and also two hundred and fifty dollars and twenty-six cents for his costs and charges, by the court here adjudged, of increase to the said plaintiff, with his assent; which said damages, costs, and charges, in the whole, amount to eleven thousand seven hundred and thirty-seven dollars and seventy-five cents.

And said defendant in mercy, &c.

Judgment signed this 4th day of December, A. D. 1873.

CHARLES MASON, *Clerk.*

40 (Indorsed:) U. S. circuit court, north. dist. of N. Y. Anson M. Baker vs. The New Jersey Mutual Life Insurance Company. (Copy.) Judgment record. Bingham & Stevens, plff's attys. Damages, $11,487.49; taxed costs, 250.26—$11,737.75. Filed December 4, 1873, 4 o'clock p. m.

41 UNITED STATES OF AMERICA:

Supreme Court.

THE NEW JERSEY MUTUAL LIFE INSURANCE Company, plffs. in error,
vs.
ANSON M. BAKER, DEFT. IN ERROR.

1. It is hereby stipulated by the respective attorneys to this action that the amendments proposed by the defendant in error to the bill of exceptions herein have been agreed to by the plaintiffs in error and incorporated in the bill of exceptions proposed by the plffs. in error, to be presented to the court or judge for his signature.

2. The defendant in error waives any objection to the signing and filing of the bill by reason of delay in preparing the same for presentation to the court which has taken place since the 28th day of Jan-
42 uary, 1874, up to this date, but does not waive his objections to the delay in serving the bill of exceptions, which had transpired on the 28th day of January, 1874; nor does the deft. in error waive any other objections to the bill of exceptions, the signing or filing of the same, except above specified.

Dated Sept. 10th, 1874.

A. M. BINGHAM,
Atty. for Deft. in Error.
L. A. HAYWARD,
Atty. for N. J. M. Life Ins. Co., Plff. in Error.

Filed Oct. 27, 1874.

43 Circuit court of the United States, northern district of New York.

ANSON M. BAKER
vs.
THE NEW JERSEY MUTUAL LIFE INSURANCE Company.

Afterwards, to wit, at a circuit court held in the city of Albany, in and for the said northern district of New York, on the 15th day of October, 1873, by and before honorable Lewis B. Woodruff, one of the associate justices of the Supreme Court of the United States, then and there holding said circuit court, came the parties aforesaid by their respective attorneys, and also by their respective counsel, and the issues thus joined then and there came on to be tried by and before the said judge and a jury.

And the said plaintiff, in order to maintain the issues on his part, introduced and examined one Dr. G. C. Hibbard, who, being duly sworn, testified that, in the month of June, 1869, he was the physician and surgeon of the New Jersey Mutual Life Insurance Company for the purpose

of examining applicants for insurance; that he examined the physical condition of Mrs. Martha C. Baker with a view to an insurance upon her life by the defendant; that one Dr. Wells, an agent of the company, was present at the examination; that among other questions propounded to the examining physician to be answered by him at that time was this numbered question 12, in the report of the examining physician: "Have the party's parents, brothers, or sisters been afflicted with pulmonary or other diseases, hereditary in their nature?" To which the answer was written, "No." The question was then asked the witness by the plaintiffs' counsel: "When that question was reached in the examination, will you state what conversation took place between you and Dr. Wells and Mrs. Baker?" To which the counsel for the defendant objected upon the ground that the answers of Mrs. Baker to the questions were written definitely, and it seemed to be the purpose of the question to vary the written answer, which formed a part of the written contract in this case.

His honor the judge overruled the objection, and allowed the question to be answered, to which ruling the counsel for the defendant then and there excepted, and the same was then and there noted.

The witness then testified in answer to the said question: "I asked in reference to the causes of the deaths of her brothers and sisters, whether they died of pulmonary consumption or not. She said it was reported that two or three of them died of pulmonary consumption; but there was difference in opinion respecting that, and she was unable to decide; her view of the question was that they had not died of pulmonary consumption."

The counsel for the plaintiff also called the said plaintiff as a witness in his own behalf, who, being duly sworn, testified that he was present when the application for insurance upon the life of himself and Mr. Baker was made out, and Dr. Wells, the agent of the company, was present to take the application. It had previously been proven by the said Dr. Wells that he filled out the application for insurance himself, and wrote the answers to the questions propounded to the applicant for insurance.

The question was then asked him by the said counsel: "I wish you to state as fully as you can all that was said and done by Mrs. Baker, Dr. Wells, and yourself on that occasion."

To which the counsel for the defendant then and there objected on the ground that the question sought to contradict the written contract.

His honor the judge overruled the objection, and allowed the question to be answered, to which ruling the counsel for the defendant then and there excepted, and the same was then and there duly noted.

The witness then testified in answer to the question: "The general questions were first noted and answered, such as name in full, residence, age, occupation, &c.

"When it came down to the 7th question, 'What members of the party's family (parents, brothers, sisters or children) have died of or been afflicted with pulmonary consumption, insanity, epilepsy, disease of the heart, scrofula, or any other hereditary disease?' to which the answer written was, 'I know of none.'

"Mrs. Baker's first answer to the question was that her brother William—it had been reported that her brother William had died of consumption. I said at that point: 'Mrs. Baker, make an explanation of what disease your brothers died, and all you know about it, as you did to Mr. Runner, when the former application was taken.'

She stated that it had been reported that her brother William died of consumption. It had also been reported in her own family that he had had a throat disease, had bronchial difficulty, and it had also been reported outside of the family that he had died of fever—low swamp fever.

"She stated that her brother Edward died in Florida, but she didn't know of what disease he died; he went there for the purpose of teaching school, and that he died suddenly. In regard to her mother, she stated that she had been a strong woman, but she died from the effects of giving premature birth to a child; that her younger sister was never regular, her menses were never settled; on arriving at that point she ran down and died; that Mrs. Clapp had worn herself out in taking care of a sick daughter, and that 'Ma' says she died of fever; that Mrs. Keith died of typhoid fever.

"After she had completed this answer, Dr. Wells said that where she had no personal knowledge she was to answer, 'Don't know.'

"Dr. Wells then wrote out the answer; I did not see what he wrote."

48 The witness further testified that question No. 16 in the application for insurance, "Has the party been afflicted during the last ten years with any severe or constitutional disease; if so, what?" to which the answer was written "No," was also asked, and was proceeding to state what Mrs. Baker said under that question, when the counsel for the defendant then and there made a special objection thereto, on the ground that it sought to contradict the written contract.

His honor the judge overruled the objection, and allowed the question to be answered, to which ruling the counsel for the defendant then and there excepted, and the same was then and there duly noted.

The witness then testified that Mrs. Baker said that she had had dysentry. The agent explained to her that he didn't think that had reference to any particular disease except constitutional disease. She answered "No" from that explanation.

49 The witness further testified that when question No. 22 in the said application was asked, "Name and residence of the party's usual medical attendant, or of the medical attendant of the family, to be referred to for information as to her health," to which the answer was written, "Has none;" she said she had no family-physician, "that we had moved away from our old home, and that it was not possible for us to employ a physician there; and furthermore, that we had never considered any physician as our family-physician; that we had employed different physicians in our family."

It had previously been proven that Mr. Baker and his family formerly resided in Nelson, Madison County, N. Y.; that in the fall of 1867 he removed to Mount Morris, Livingston County, which is about two hundred miles from his former residence, and Mrs. Baker and the family followed in the spring of 1868, and up to the time of taking such application had never employed a physician in their family since his removal to Mount Morris.

Dr. Wells afterwards testified that the answer to this question was put down just as it was given and nothing more was said, and that after he had read the question and put down the answer he read the answer in each case that had been put down to Mrs. Baker.

50 The said defendant, in order to maintain the issues on his part, introduced and examined as a witness one Dr. Levi P. Greenwood, who, being duly sworn, testified that he resided in the town of Nelson, Madison County, and had been in practice as a physician and surgeon since the year 1840; that he knew Martha C. Baker in her life-

time in said town, and was called and attended her as a physician about the year 1855, at the birth of her first child; that from that time onward he was frequently called to see her and her family in a professional capacity; that he knew of no other physician being called to her or the family from that time up to the time she removed to the western part of the State, (which was in the spring of 1868;) that in the month of October, 1866, in the town of Nelson, she had dysentery, which was a severe attack and somewhat alarming, and that he attended her as a physician on that occasion and continued his attendance for some ten or twelve days, or a little more.

The witness further stated that after Mrs. Baker removed to Western New York he received, by due course of mail, a communication
51 from her with reference to her health, of which the following is a copy.

The admission of this letter was objected to by the plaintiff as incompetent; the contract between the parties was in June, 1869, and the letter is dated Feb. 24, 1870. The objection is that it is the declaration of a person not the plaintiff, nor by whose declarations the plaintiff is bound.

The court admitted the letter in evidence.

The following is a copy of the letter:

"EAST AVON, *Feb.* 24, 1870.

"Dr. L. P. GREENWOOD:

"DEAR SIR: If I was in your vicinity I should send for you to come and see me instead of taking the pen to tell you I am sadly out of health, and I want you to advise me a little, if you will. I dare say if you could see me five minutes you could get a better idea of my case than by reading this letter, but you are not a stranger to my constitution. I have a hard cough, and raise a good deal of thin, watery phlegm, like white of egg beaten, occasionally some heavy, yellow matter. I have had a hacking cough a long time. I have within a year
52 taken three bottles of Jayne's expectorant without much seeming benefit. I have taken within a month one bottle of Schenck's pulmonic syrup. I could not take the tonic that came with it, it seemed to cause so much heat. Since about October my cough has been growing more serious. I have frequent spells of coughing and sickness at the stomach, water flowing freely, but do not vomit much. I have within two weeks taken two syrups of ipecac emetics. I threw up considerable white phlegm. * * * * Have chills, creeping chills, every forenoon, and a fever nearly every afternoon; if I have ever sweat nights, it has been but little. I am up and around, and do some light few things, but my breath is so short I cannot endure fatigue. I am poor & pale and weak, but it sometimes seems as though there was enough of me to rally yet, and at others I feel such a sense of suffocation at my chest when I talk a while or sing a few words that I really give up all hope of ever being any better. I have applied mustard freely to my shoulders and chest. My shoulders feel about as bad, and, really, much of the time worse that I do anywhere. What pain I have had in
53 my side (and not any recently) has been in my right side. Now, will you, can you, spare a few thoughts and moments to write to me what you think I had better try, anything or nothing? I am not acquainted with the doctors here, and I am of that unlucky number that have a terrible horror of medicine. I am at my father's, under the care of one of the kindest, dearest mothers in the world.

"Awaiting a reply, I remain, your friend,

"Mrs. M. C. BAKER."

"Direct, 'Mrs. M. C. Baker, East Avon, Livingston County, N. Y., care F. Dana.'"

The witness further stated that he replied to this letter, and sent her a prescription; that subsequently, about the 20th of June, of the same year, 1870, he saw her at the house of her sister, Mrs. Smith, in the town of Nelson, on two occasions, in which she told him she had come to advise with him. She consulted him in regard to the letter and the prescription he had made for her; that she told him she had received his letter and obtained the medicine he directed; that a part of it seemed to do her good, but the cod-liver oil she could not take—her stom-
54 ach rejected it. He told her that she had confirmed consumption. The witness never saw her after this.

The application for insurance upon which the policy in this action issued was made and dated June 18, 1869, and Mrs. Baker died of pulmonary consumption on the 6th day of December, 1870.

The same witness also testified that about the year 1853 he became acquainted with Mrs. Keith, a sister of Mrs. Baker; that he was her physician from that time until she removed from Nelson to the western part of the State; that he treated her for a disease which, in his opinion, was a scrofulous inflam'ation in the knee-joint, and also for salt-rheum, which is a scrofulous disease of the skin; and that this is the same disease aspulmonary consumption, only it is seated in a different locality

The said witness on cross-examination testified that he had been a physician and surgeon since the year 1840; that he did not call
55 scrofulous disease of the knee-joint pulmonary consumption; that it is the same disease, but located in a different locality: the same cause produces it; that one cannot have pulmonary consumption in any part of the body but the lungs; that one can have a disease in the lungs and have the same disease in the knee, but it will take a different name; that Mrs. Keith did not have pulmonary consumption; that he treated it as a scrofulous disease in the knee-joint, and he presumed that she fell out of a wagon and hurt her knee, and that this disease growing out of her falling from a wagon has not a relation to pulmonary consumption.

The defendant also introduced the deposition of Dr. Oliver P. Wolcott, of the city of Milwaukie, who, upon oath, testified that he was a physician and surgeon, 69 years of age, and has practiced medicine for forty-eight years; that he was acquainted with William L. Dana, a brother of Martha C. Baker, in his life-time, and treated him professionally before his death; that he examined the state of his lungs some two years before his death, and found signs of disease therein, which he pronounced turbercular consumption; that the disease was at
56 first insidious and slow, but at last showed its most aggravated symptoms, until his death, which occurred on or about Apri 16th. 1864, in the city of Milwaukie; that the disease of which he died was tubercular consumption, and that in his opinion as a physician that disease was hereditary with him.

The defendant also introduced as a witness Dr. Samuel N. Brayton, who, being duly sworn, testified that he resided in Honeoye Falls, Monroe Co., N. Y.; was by profession a physician and surgeon, and had been in practice for 12 or 13 years; that in the month of October, 1867, he was called professionally to attend Mrs. Cookingham, a sister of Martha C. Baker; that she had complained of pain in the lungs. He examined them by auscultation and percussion, and found that they were

weak; he pronounced them at that time afflicted with incipient tuberculosis—that is, the beginning of pulmonary consumption, the very commencement; that in the month of April, 1868, he commenced attending her regularly, that is, 'very day, or every other day, and she at that time had night-sweats and coughed and raised considerable; she was very much emaciated, had hectic fever, and was in an advanced stage of pulmonary consumption; that the disease was developed some
57 time before the death of her sister, Mrs. Keith, in the month of June, 1868, and she died of that disease in the month of January, 1870.

On cross-examination he testified: If it were not developed, a person unskilled could not detect it, nor a physician except by a careful and critical examination. The existence of tubercles in the lungs can be determined by auscultation and percussion, for the sound is duller over these spots than others, and the air passing around them causes an irregular sound. Her health was better in November, 1868, than it had been in two years. From June to November of that year she was so smart that he didn't attend her. Physicians do not call a disease consumption until it is developed, and it is not developed until the tubercles become softened and begin to consume the lungs.

The same witness also testified, upon his direct examination, that in the month of April, 1868, he examined the lungs of Mrs. Keith, a sister of Martha Baker, and was of the opinion at that time that she had incipient tuberculosis—the beginning of pulmonary consumption, and told her that her lungs were very weak, and there was danger of tubercles, the same as there was in Mrs. Cookingham's case. He com-
58 menced attending her regularly May 5th, 1868, and examined her lungs frequently from May 5th up to her death, and found tubercles there quite extensively. She expectorated very much. She died about June 4, 1868, of typhoid fever.

The defendant also introduced as a witness William A. Runner, who testified that in the month of November, 1868, he took an application from Anson M. Baker, the plaintiff, and Martha C. Baker, for an insurance upon their joint lives in the Home Life Insurance Company, and that during the preparation of the application Mrs. Baker stated to him that two of her sisters, Laura (Mrs. Clapp) and Margaret (Mrs. Keith) died of consumption.

Mr. Baker in his testimony denied that Mrs. Baker made any such statement to Mr. Runner about the death of her two sisters, but states that she told him (Runner) it had been reported that her brother William had the consumption.

The defendant also introduced as a witness Dr. W. R. Wells, who testified that in the month of June, 1869, he took the application for insurance in this case, and that upon that occasion Mrs. Baker stated that one of her brothers died with consumption.

59 The plaintiff was called as a witness, and testified that from the time of their removal from Nelson to Mount Morris they had never called a physician in the family up to the time of making the application for insurance in this case; that the distance between the two places is about two hundred miles; that Mrs. Baker's health had been uniformly good; she had always done the work in the family, and up to the time of her application for insurance had not to his recollection since their marriage had a cough.

He also stated that Mrs. Baker at the time the application was taken gave the agent a history of the death and disease of which all her brothers and sisters and her mother died; that she stated that her

brother William died in Wisconsin, and it had been reported that he had consumption; also, that he had a bronchial difficulty and fever; that her brother Edward died suddenly in Florida; that Mrs. Clapp and Mrs. Keith died of fever; that her youngest sister died on arriving at the age of womanhood from an obstruction of the menses, and her mother from giving birth to a child.

These were all the members of the family who were dead at that time.

60 She further stated that the health of Mrs. Cookingham was not good at the time the application was taken.

She also stated that she, Mrs. Baker, had had dysentery; the agent explained to her that he did not think that question had reference to any particular disease except constitutional diseases: she answered "No" from that explanation.

The witness further testified that he failed in business as a merchant, and his goods were sold at auction in the fall of 1869; that during the auction-sales, his wife, Mrs. Martha C. Baker, took cold and had a cough; that their financial embarrassments affected her health, and from that time she run down and died in December, 1870; that he purchased for her in the fall of 1869 some bottles of Jayne's expectorant, which was a cough medicine, and this was the first he knew of any indications of any difficulty with regard to her health; that William removed to the West before they were married; that he (William) was present at their marriage in 1855 and thinks he called upon them the year after, which was the only time they had seen him since their marriage; that Mrs.

61 Keith lived about twenty miles from them at the time of her death; that he, witness, had visited her two days before her death; she had a high fever; understood she died of typhoid fever, and told Mrs. Baker that was the cause of her death. He further stated that the application was taken at the house. No one was present at the time but Dr. Wells, the agent, Mrs. Baker, and himself, and that the application was not read over after it was signed, and he never read it.

In reference to what occurred at the time the application was made out, Dr. Wells, a witness for the defendant, afterwards testified:

Mrs. Baker said one of her brothers died with consumption. Mr. Baker says, "It is no such thing; what do you answer so for?" Her reply was, "Why, yes, Mr. Baker, you know that is what we always supposed; that this brother died with the consumption." "Well," he says, "you don't know anything about it. Just confine your answer to what you know. How do you know he died with the consumption?" The witness then proposed to leave the matter until some other day. Mr. Baker said, "No; go along with it; finish it up now. It may as well be done now as any time." Mrs. Baker gave

62 the answer, "I know of none." He said that was a correct answer, for he said to her she didn't know, and that was the proper answer. The witness asked Mrs. Baker if that was her answer; if he should put the answer down in that way. She said he might, and he did so.

The witness also testified that Mrs. Baker did not tell him on that or any other occasion that she had had an attack of dysentery some years before, but that the answer to question 16 (see folio 10–11) is put down just as she gave it; that the same is true of question 22, (see above, fol. 12,) and that he did not advise or suggest any answer to be made to any of the questions.

The plaintiff also stated, in his direct examination, that he had a conversation with Mr. and Mrs. Runner in the winter of 1869, imme-

diately preceding his going out of business, in which he stated that his wife's health was poor.

Dr. Hibbard, being called as a witness for the plaintiff, testified that he was a physician and surgeon; that he resided in 1869 at Mount Morris, and was at the time the examining surgeon of New Jersey
63 Mutual Life Insurance Company; that he examined Mrs. Baker on her application for insurance, examined the lungs by measurement, auscultation, and percussion. Dr. Wells, the agent of the company, called on him to make the examination, and was present; the indications were a healthy condition of the lungs, although he did not examine specially with reference to that subject; discovered no evidence of any constitutional disease. He further testified that upon such examination she was asked the question if she had ever had any severe injury or illness—referring to question 13 in the "Examining Physician's Report;" that she replied that a few years previous she had been very sick for a few days with the dysentery, but said she had recovered perfectly.

Witness told her the question had reference to a disease that left impaired health; otherwise he could not see the use of it, and, on her explanation, he took the responsibility of writing it in the negative.

Dr. Hibbard also testified that on his examination of Mrs. Baker, the agent of the company, Dr. Wells, who was also a physician, was present; that Mrs. Baker informed them, under question No. 12 in the Physician's Report, that it had been reported that two or three of her
64 brothers and sisters had died of pulmonary consumption; but there was a difference of opinion respecting that, and she was unable to decide. Her view of the question was that they had not died of pulmonary consumption; that he (witness) told her that inasmuch as neither of her parents had pulmonary consumption, it could not be hereditary, and he should put the question down in the negative.

The question, with its answer, will be found above, in folio 3.

Dr. L. W. Joslyn was sworn as a witness for the plaintiff, and testified that he was a physician and surgeon; that about Nov. 23, 1868, he examined Mrs. Baker to ascertain her physical condition with a view to life-insurance; that he examined carefully the lungs, and that he could not detect any indications of disease in any part of the system.

Dr. W. H. Sellers was sworn on the part of the plaintiff, and testified that he was a physician and surgeon; that he examined Mrs. Baker in the fall of 1869; that she came to his office and complained
65 at that time of feeling weak; that he examined the lungs by the usual methods, and looked the case over, as he would any stranger, to see if he could discover whether she had any functional difficulty or organic disease, and that he could not discover any indications of disease.

Both Drs. Joslyn and Sellers testified that there were diseases so nearly allied to consumption in all their symptoms, that, without a knowledge of the family and of the previous condition and history of the patient, there were no means by which they could distinguish them; that pneumonia was one—all of the symptoms were the same as in consumption; that this disease was not hereditary, and in their opinion most of the cases of rapid consumption, so-called, were pneumonia.

Dr. L. W. Potter was also sworn as a witness for the plaintiff, and testified that he had been in practice fifty years, and his experience in the treatment of pulmonary diseases has been considerable; that he attended Mrs. Clapp in her last illness. He did not consider there was any dis-

ease of the lungs, but she had gastric fever, one exciting cause of which was the sickness of a daughter who had fits; that there was a gradual decline, which exhibited itself in gradual emaciation and softening
66 of the flesh, and that this emaciation and softening are symptoms of pulmonary, and also of other diseases; that he could not say what disease she died of. He also testified that tubercular consumption was not necessarily hereditary, but was sometimes developed from other causes.

It was proven by the testimony of witnesses introduced by the defendant that the family of Federal Dana, who was the father of Martha C. Baker, formerly consisted of the parents and eleven children. At the time of taking the application, the mother and five of the children were dead.

William L. Dana lived and died in Wisconsin, and there was proof on the trial tending to show that he died of consumption, and that the agent was informed by her of all which she appeared to know of the cause of his death.

I. Edward Dana went to St. Augustine, Florida, on account of ill health, and died suddenly. No proof as to the cause of his death.

Eliza Ann Dana died upon arriving at womanhood (at the age
67 of 15) from obstruction of the menses.

Laura A. Clapp; no proof as to the cause of her death.

Margaret Ellen Keith died in June, 1868, of fever.

The mother died from giving premature birth to a child.

Mrs. Cookingham died subsequently to the taking of this insurance.

It was not proven that Mrs. Baker had, at the time of obtaining this insurance, any actual knowledge of the diseases of which any member of her father's family then was or ever had been afflicted, except what was stated to the agent of the company at the time application for the insurance was made.

After the testimony was all closed, the counsel for the defendant asked the court to direct the jury to find a verdict for the defendant, as the evidence was not sufficient to sustain a verdict for the plaintiff.

That there is undisputed evidence of a violation of one of the express warranties contained in this application—the 22d, "The name and residence of the party's usual medical attendant, or of the medical
68 attendant of the family, to be referred to for information as to her health," to which the answer was written, "Has none," and there is no conflict as to the matter of this answer. The testimony of Mr. Baker is that she answered, "We have no physician, medical attendant," while it is proved by the testimony of Dr. Greenwood, and by the letter of Mrs. Baker to him, which has been put in evidence, that Dr. Greenwood had been her family-physician from the birth of her first child down to his last visit to her when she had confirmed consumption, as he frankly informed her; also, by the letter of Mrs. Baker, dated February, 1870, in which she appeals to him for medical advice and aid, and in answer to which a prescription was sent, which she used. This question called for information that was, by the proof and upon its face, within her personal knowledge; an important question, and one that should have been answered truthfully. Upon the undisputed evidence the answer was false.

So in regard to question No. 7: "What members of the party's family (parents, brothers, sisters, or children) have died of or been afflicted with pulmonary consumption, insanity, epilepsy, disease
69 of the heart, scrofula, or any other hereditary disease?" to which the answer was written, "I know of none."

We submit that there is evidence here not disputed that some of the sisters had been afflicted with diseases mentioned there—scrofula and consumption. Mr. Baker, it is true, has raised an issue as to the death of the sister and the brother, but not as to the question of their having been afflicted with or suffering from any of the diseases mentioned in that question. We insist, therefore, that the answer to that question was a clear breach of warranty, taking Mrs. Baker's own statement with the other evidence.

This request so to direct the jury was denied by his honor the judge, who declined so to direct; to which ruling the counsel for the defendant then and there excepted, and the same was then and there duly noted.

After the charge was given by the judge to the jury, they retired, and on coming again into court announced that they found a verdict for the plaintiff in the said action for the sum of $11,487.49.

70 And, because none of the said exceptions, offers, and requests, and exceptions so offered, made and excepted to as aforesaid, to the rulings, opinions, and decisions of the said judge, do appear upon the record of the said trial, therefore, on the prayer of the said defendant, by its said counsel, his honor the judge hath to this bill of exceptions set his hand and seal, according to the statute and the rules and practice of this court in such case made and provided, this twenty-third day of October, 1874.

(Signed) L. B. WOODRUFF, [L. S.]
Circuit Judge.

71, 72, 73

74 (Indorsed:) Circuit court of U. S., N. dist. of New York. Anson M. Baker v. N. J. Mu. Life Ins. Co. (Copy.) Defendant's bill of exceptions, with plaintiff's amendments. L. A. Hayward, def't's att'y, Warsaw, N. Y. Filed Oct. 27, 1874.

75 Circuit court of the United States of America, for the northern district of New York, in the second circuit.

ANSON M. BAKER
vs.
THE NEW JERSEY MUTUAL LIFE INSURANCE CO. } Bond for costs.

Know all men by these presents, that we, Jesse R. Irwin and William H. Miller, of the city of New York, are held and firmly bound unto the above-named Anson M. Baker in the sum of twenty-five thousand dollars, to be paid to the said Anson M. Baker; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators jointly and severally, firmly by these presents, sealed with our seals,' and dated the day of December, in the year of our Lord one thousand eight hundred and seventy-three.

76 Whereas the above-named N. J. Mutual Life Ins. Co. has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named N. J. Mutual Life Ins. Co. shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea

good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

WILLIAM H. MILLER. [L. S.]
JESSE R. IRWIN. [L. S.]

Sealed and delivered, and taken and acknowledged, this 16th day of Dec., 1873, before me.

R. E. STILWELL,
U. S. Comr.

77 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Jesse R. Irwin, Wm. H. Miller, being duly sworn, each for himself deposes and says that he is a resident of New York City, & afreeholder in this State; that he is worth the sum of fifty thousand dollars over and above all his just debts and liabilities.

JESSE R. IRWIN.
WILLIAM H. MILLER.

Sworn to this sixteenth day of December, A. D. 1873, before me.

R. E. STILWELL,
U. S. Comr.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

On this sixteenth day of December, 1873, personally appeared before me Jesse R. Irwin and Wm. H. Miller, the parties within named, who made oath as above stated, and acknowledged before me that they executed the within bond for the error and purposes therein mentioned.

R. E. STILWELL,
U. S. Comr.

78 (Indorsed:) U. S. circuit court. Anson M. Baker vs. The New Jersey Mutual Life Ins. Co. (Copy.) Bond for costs on writ of error. L. A. Hayward, deft. proctor, Warsaw, N. Y. Approved Dec. 16th, 1873. L. B. Woodruff, cir't judge. Filed December 18, 1873.

79 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of New York, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Anson M. Baker, plaintiff, and The New Jersey Mutual Life Insurance Company, defendant, a manifest error hath happened, to the great damage of the said The New Jersey Mutual Life Insurance Company, as by its complaint appears: we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together
80 with this writ, so that you have the same at Washington on the second Monday of October, 1874, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Nathan Clifford, associate justice of the said Supreme Court, this 6th day of December, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.] CHARLES MASON,
Clerk of the Circuit Court of the United States for the Northern District of New York.

Allowed by

L. B. WOODRUFF,
Circuit Judge.

81, 82 (Indorsed:) Supreme Court of the United States. The New Jersey Mutual Life Insurance Company, pl'ff. in error, vs. Anson M. Baker, deft. in error. Writ of error. Filed December 18, 1873.

83 UNITED STATES OF AMERICA, *ss:*

To Anson M. Baker, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, 1874, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the second circuit and northern district of New York, wherein The New Jersey Mutual Life Insurance Company is plaintiff in error and Anson M. Baker is defendant in error, to shew cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Clifford, one of the justices of the said Supreme Court of the United States, this seventeenth day
84 of December, in the year of our Lord 1873.

L. B. WOODRUFF,
Circuit Judge of the 2d Judicial Circuit of the United States.

(Indorsed:) Supreme Court of the United States. The New Jersey Mutual Life Insurance Company, plaintiff in error, vs. Anson M. Baker, defendant in error. Citation. Filed Dec. 22, 1873.

85 UNITED STATES OF AMERICA,
Northern District of New York, ss:

I, Charles Mason, clerk of the circuit court of the United States of America for the northern district of New York, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suitof Anson M. Baker vs. The New Jersey Mutual Life Insurance Company.

In testimony whereof I have hereunto set my hand, and duly affixed the seal of the said court, at the city of Utica, in said district, this 30th day of October, A. D. 1874.

[SEAL.] CHARLES MASON, *Clerk.*

(Indorsed:) Supreme Court of the United States. The New Jersey Mutual Life Insurance Company, pl'ff in error, vs. Anson M. Baker. Return to writ of error.

(Indorsement on cover:) No. 229. The New Jersey Mutual Life Insurance Company, plaintiff in error, vs. Anson M. Baker. N. New York C. C. U. S. Filed 4th November, 1874.

Supreme Court

OF THE UNITED STATES.

THE NEW JERSEY MUTUAL LIFE INSURANCE COMPANY, *Plaintiff in Error,* *vs.* ANSON M. BAKER, *Defendant in Error.*	*Points of Plff. in Error.*

STATEMENT.

This comes up on a writ of error to the Second Circuit. The defendant in error brought his action in the Supreme Court of New York—venue in Livingston County—against the plaintiff in error, a corporation incorporated under the laws of the State of New Jersey, to recover the amount of a policy on the life of his wife, Martha C. Baker, for $10,000. The plaintiffs in error had their principal office for the transaction of their business at Newark, in the State of New Jersey, and the policy in question was effected at one of their country agencies, to wit: at Mount Morris, Livingston County, State of New

York, on June 28th, 1869 (fols. 5 and 6 of Complt.). The assured died on the 6th December, 1870, at East Avon, in the same county (fol. 7). The defendant in error furnished his proofs of loss and interest on the 1st June, 1871 (fol. 7).

At the time of effecting the insurance, Doctor G. C. Hibbard, the physician and surgeon of the plaintiff in error, made an examination of the applicant, Mrs. M. C. Baker; a Doctor Wells was present as agent of the Company. It appeared that, as the basis of the application, a series of questions were propounded to the applicant, which she was required to answer before her application was passed by the Company (fol. 44).

The seventh question was, "What members of the party's family (parents, brothers, sisters, or children) have died of, or been afflicted with, pulmonary consumption, insanity, epilepsy, disease of the heart, scrofula, or any other hereditary disease?" To which the answer, written in the presence of the applicant, which was on the application when presented at the head office for ratification, was, "*I know of none*," (fol. 46).

In point of fact, it was proven in the trial below, that the assured was the daughter of one Federal Dana, who had by his wife eleven children (fol. 66).

At the time of the application for insurance in question, the mother of the assured (the wife of Federal Dana) and five of her children, brothers and sisters of the assured, were dead, to wit:

1. William L. Dana died of consumption, in Wisconsin (fols. 56, 66).

2. Edward Dana went to St. Augustine, Florida, and died suddenly there (fol. 66).

3. Laura A., wife of Clapp—she died of consump-

tion, as the assured stated previously to a Mr. Runner, the agent of the Home Life Insurance Company (fol. 58).

4. Margaret, wife of Keith, who also died of consumption (fols. 58, 54, 57).

5. The mother, Mrs. Dana, died from giving premature birth to a child (fol. 67).

6. Mrs. Cookingham, another sister of the assured, was not well at the time of the application, but died subsequently to it of consumption (fol. 57).

The plaintiff in error examined below, on the trial, one William A. Runner, who testified that in November, 1868, he took an application from the present defendant in error and the assured for an insurance on their joint lives in the Home Life Insurance Company, and that during the preparation of the application Mrs. Baker (the present assured) stated to him that her two sisters—Laura Clapp and Margaret Keith—had died of consumption (fol. 58).

Singular to state, an action was commenced on this last-named policy—tried at the Livingston Circuit. The husband (the present defendant in error) was nonsuited because of a false statement in answer to a similar question. The nonsuit was affirmed at the General Term of the Supreme Court of New York, and on appeal to the Court of Appeals, such nonsuit was finally confirmed. The opinion is reported in 5th Insurance Journal, p 661. Vol 5 p 9.

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Another question at the time of the application was put to the applicant, Mrs. Baker, viz.: "Number 12. Have the party's parents, brothers, or sisters been afflicted with pulmonary or other diseases hereditary in their nature?" To which the answer was "No" (fol. 44), in the presence of the applicant,

and so appeared when presented at the head office for confirmation.

On the trial below, evidence was introduced which showed that Mrs. Keith, a sister of the assured, in 1853, was afflicted with a scrofulous inflammation of the knee-joint, a cognate disease with tuberculous consumption (fols. 54, 55, 56).

That William L. Dana, her brother, died in 1864 with confirmed tuberculosis, and that such disease, in the opinion of the attending physician, was hereditary (fol. 56).

That Mrs. Keith (her sister) died of pulmonary consumption in June, 1868 (fols. 57 and 58).

That Mrs. Cookingham, another sister, was taken, in October, 1868, with incipient pulmonary consumption, and eventually died of it in January, 1870.

Still another question was put to the assured (fol. 48): "Question No. 16. Has the party been afflicted during the past ten years with any severe or constitutional disease; if so, what?" To which the answer was written in the presence of the assured, and so appeared when presented at the home office, "No."

It appeared below, on the trial of the cause, by the testimony of Dr. Greenwood, that in the month of October, 1866, in the town of Nelson, the assured had had dysentery, which was a severe attack, and somewhat alarming. That he had attended her as a physician on that occasion, and continued his attendance for some ten or twelve days, or a little more. A letter was read in evidence (fol. 51) in which the assured makes use of expressions which tend to prove that within one year prior to the date of the letter she had been suffering under the incipi-

ent stages of consumption, a portion of which time was prior to the date of the application for the present insurance.

Another question was asked the assured at the time of the application—No. 22—in which the assured was requested to give the "name and residence of the parties, usual medical attendant, or of the medical attendant of the family, to be referred to for information as to her health," to which the answer was written in the presence of the applicant, and so appeared in the application presented at the head office, "Has none." She said she had no family physician; that "we had moved away from our old home, and that it was not possible for us to employ a physician there; and, furthermore, that we have never considered any physician as our family physician; that we had employed different physicians in our family" (fol. 49).

It appeared on the trial below that Dr. Greenwood, prior to the removal of the defendant in error and his wife from Nelson, in Madison County, N. Y., to Mount Morris, in Livingston County, which was in the fall of 1867 for the husband, and in the spring of 1868 for the wife—to wit, in the year 1855, at the birth of her first child—was called in and attended the assured as her physician; that from that time onward he was frequently called in to see her and her family in his professional capacity. That he knew of no other physician being called to her up to the time she removed to the western part of the State, which was in the spring of 1868. That in October, 1866, while the assured lived in the town of Nelson, she had had dysentery, which was a severe attack, and somewhat alarming, and that he had attended her as a physician on that occasion, and

continued his attendance for some ten or twelve days, or a little more. He then refers to the letter of February 24, 1870, written by the assured to him. That after the insurance was effected, and in the year 1870, he was consulted by the assured; he examined her, found that she had confirmed consumption, and so told her. The assured, in a few months thereafter, died of consumption. The case at bar was removed from the Supreme Court of New York into the U. S. Court, and was tried before Woodruff, *Ct. J.*, at Albany, in New York State. On the trial of the cause, for the evident purpose of obviating the effect of the assured's answer to questions 7, 12 and 16, the counsel for the defendant in error put questions to Dr. Hibbard and to the defendant in error himself, viz.: "State the conversation which took place between the assured, Dr. Wells, and Dr. Hibbard, at the time of taking the application?" To each of which questions the counsel for the plaintiff in error objected; that the purpose of the question was to vary the written answer which formed part of the written contract in the case, and thereby sought to contradict the written contract. (See fols. 44, 46 and 48.)

The objections were severally overruled by the Court below, to which rulings several exceptions were in due form taken by the plaintiff in error. After the testimony was all closed, counsel for the plaintiff in error asked the Court below to direct the jury to find a verdict for the defendant, as the evidence was not sufficient to sustain a verdict for the plaintiff, because that the undisputed evidence showed that the answer of Mrs. Baker to the 22d question was false; also the answer to question 7 was false. (See fols. 68–70.)

These requests were denied by the Judge, to which exceptions were severally taken. The jury found a verdict against the plaintiff in error. A bill of exceptions was sealed, and the case now comes up before this Court on a writ of error.

POINTS.

I.—The answer and statements in the application are warranties. The application is a part of the contract upon the faith of which the policy was issued, and the statements and answers contained in it are made special warranties. If found untrue in any respect, the policy is void, Upon this point the current of authority is substantially uniform.

Higbie *vs.* Guardian Mutual Life, 53 N. Y., 603.

First Nat. Bank *vs.* Insurance Co. of N. Y., 50 N. Y., 45.

Leroy *vs.* Market Insurance Co., 37 N. Y., 91, and 45 N. Y., 80.

Ridley *vs.* Ætna Insurance Co., 30 N. Y, 136.

Smith *vs.* The Ætna Life, 49 N. Y., 211.

Warranties differ from representations in that they form part of the contract, and must be true and strictly complied with.

Bliss on Life Insurance, Secs. 34–43.

Campbell *vs.* New England Life Ins. Co., 90 Mass., 311.

Chase *vs.* Hamilton Ins. Co., 20 N. Y., 57.

They also differ in this: that truth, and not materiality, is the only question in relation to warranties.

Voss *vs.* Eagle Life Ins. Co., 6 Cushing, 42.

Anson *vs.* Fitzgerald, 4 House of Lords Cases, 48.

Meyers *vs.* Connecticut Mutual Life, 3 Gray, 580.

II.—The evidence shows that Mrs. Baker's family were scrofulous and consumptive; that her brothers and sisters above mentioned had been afflicted with a constitutional disease—scrofula, tubercular and pulmonary consumption—and that the answers to the 7th, 12th and 16th questions in the application for insurance were manifestly untrue and evasive; and particularly it appeared on the trial that Mrs .Baker, when these questions were put to her, answered evasively, if not untruly. Thus, in answer to the twelfth question, under the exception of the plaintiff in error's counsel that the answers were an attempt at contradiction of the written contract, wherein Mrs. Baker is reported to have said that "two or three of her brothers were reported to have died of pulmonary consumption, but that there was a difference of opinion respecting that, and that she was unable to decide. Her view of the question was that they had not died of pulmonary consumption."

It was subsequently proven that the assured

had stated to Dr. Wells that one of her brothers had died of consumption (fol. 61).

Then the testimony shows that Mr. Baker, the defendant in error, says, "It is no such thing." "What do you answer so for?" The reply was, "Why, yes, Mr. Baker—you know—that is what we always supposed that this brother died of, consumption." "Well," said he, "you don't know anything about it; just confine your answer to what you know. How do you know that he died of consumption?" Witness then proposed to leave the matter until some other day. Mr. Baker said, "No, go along with it; finish it up now; it may as well be done now as at any time." Mrs. Baker then gave the answer, "*I know of none.*" He said "that was a correct answer," for her husband said to her, "she did not know, and that was the proper answer." *Witness asked Mrs. Baker if that was her answer —if he should put the answer down in that way; she said he might, and he did so* (fols. 61, 62).

Witness further stated that Mrs. Baker did not tell him, on that or any other occasion, that she had had an attack of dysentery some years before, but that the answer to question 16 was put down just as she gave it. That the same was true of question 22; that he did not advise or suggest any answer to be made to any of the questions (fol. 62).

III.—The defendant in error, in his complaint below, asked no relief to reform the contract, on

the ground that the agent of the insurance company, in the application for insurance and the answers to the different questions, had incorrectly taken down the statements of the assured, and reported erroneously the answers of the assured to the various questions propounded to her and above referred to. It appeared, on the trial of the cause, that Dr. Wells, an agent of the Company, had filled out the application for insurance himself, and wrote down the answers to the questions propounded to the applicant for insurance.

Dr. Wells *testified that the answers to the questions were put down just as they were given, and nothing more was said. That after he had read the question he put down the answer given; he then read the answer over to Mrs. Baker in each case* (fol. 49).

This case is distinctive from 13 Wallace 236 & 21 Wallace 155 How there is no pretence that the agent put down a different answer from statement of assured — He did not put down its modifications

Now, in default of any issue in the cause claiming a reformation of the contract, we submit it was improper for the learned Judge below to allow evidence to be given that the assured made answers contradictory to those which were actually recorded, or which were explanatory of them, or which modified them in any way, when such contradiction, variation and modification did not appear on the face of the application submitted to the plaintiffs in error. Certainly such evidence was improper to be admitted unless brought home to the plaintiffs in error before passing upon the application.

Ripley *vs.* The Ætna Ins. Co., 30 N. Y. Reps., p. 136.

Angell on Ins., 143.

Jennings *vs.* The Chenango Mut. Ins. Co., 2 Denio, 75.
Kennedy *vs.* St. Lawrence Mutual Ins. Co., 10 Barb., 285.

IV.—The Court below (Woodruff, Circuit Judge) erred in refusing the request made by the defendant's counsel (fols. 67 to 70).

(*a.*) The assured, in answering the 22d question put to her when the application for insurance was made by her, viz.: "*The name and residence of the party's usual medical attendant, or of the medical attendant of the family, to be referred to for information as to her health,*" to which the answer was written, "*Has none,*" was guilty of misrepresentation, and of a breach of warranty.

This was a material warranty, which, if false, vitiated the policy.

(*b.*) The evidence was uncontradicted that Doctor Greenwood had been Mrs. Baker's (the assured's) medical attendant, from the birth of her first child, down to his last visit to her, when he ascertained by a medical examination that she had confirmed consumption.

See Dr. Greenwood's testy., fols. 50 to 56.
See, also, the letter of the deceased (the assured), written to said Doctor in Feb. 24, 1870, fols. 51 to 54.

In 5 Robt p 455 The Court take the case away from the jury on this point Held good on appeal

the ground that the agent of the insurance company, in the application for insurance and the answers to the different questions, had incorrectly taken down the statements of the assured, and reported erroneously the answers of the assured to the various questions propounded to her and above referred to. It appeared, on the trial of the cause, that Dr. Wells, an agent of the Company, had filled out the application for insurance himself, and wrote down the answers to the questions propounded to the applicant for insurance.

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See Dr. Greenwood's testy., fols. 50 to 56.
See, also, the letter of the deceased (the assured), written to said Doctor in Feb. 24, 1870, fols. 51 to 54.

(*c.*) This question called for information that was by the proof, and upon its face, within her personal knowledge—an important question, and one that should have been answered truthfully.

Upon the undisputed evidence, this answer was false.

As to the legal construction as to who is the usual medical attendant—

See Monk *vs.* The Union Mutual Life Ins. Co., 6 Robertson, 455.

Gibson *vs.* The American Mutual Life Ins. Co., 37 N. Y., p. 580.

Huchman *vs.* Ferrie, 3 Mees. & W., 505 (Exchequer, 1838).

V.—The Court below (Woodruff, *C. J.*) erred in refusing the request made by the defendant's counsel (fol. 69).

(*a.*) The deceased (the assured) in answering the Q. No. 7, "*What members of the party's family (parents, brothers, sisters or children) had died of, or been afflicted with, pulmonary consumption, insanity, epilepsy, disease of the heart, scrofula, or any other hereditary diseases,*" to which the answer was written, "*I know of none.*"

(*b.*) There was evidence here, not disputed, that some of the sisters had been affiicted with diseases mentioned there—scrofula and consumption.

(*c.*) Mr. Baker, it is true, had raised an issue as to the death of the sister and the brother, but not as to their having been afflicted with, or suffering from, any of the diseases mentioned in that question.

We insist, therefore, that the answer to that question was a clear breach of warranty, taking Mr. Baker's own statement with the other evidence.

The following case is conclusive on this point: see

Anderson *vs.* Fitzgerald, 4 House of Lords Cases, 484.

See also

Campbell *vs.* The New England Mut. Life Ins. Co., 98 Mass., 381.

Valton *vs.* National Life Co., 20 N. Y., p. 32.

To use the words employed by the Court in Davenport *vs.* New England Ins. Co., 6 Cushing, 341, 342, it is manifest that the defendants deemed this information material, and they put the direct question, and it was a proper and practical question, and it was material that the assured should answer it truly.

The assured having given an untrue answer, whether by accident, mistake or design, it matters not, to a direct, plain, and practical question, cannot be heard to say it was immaterial.

VI.—The Court below (Woodruff, *C. J.*) erred in overruling the objections and exceptions taken by the defendant's counsel on the trial to the question put by the plaintiff's counsel to the witness Doctor Hibbard, fol. 44.

It appears that the examining physician for the defendant's company had put the various questions to the assured, and had arrived at Question 12, viz.: "*Have the party's parents, "brothers, or sisters, been afflicted with pulmonary "or other diseases hereditary in their nature?*" To which the answer was written, "No."

Then the plaintiff's counsel asked the witness, "When that question was reached in the examination will you state what conversation took place between you and Dr. Wells and Mrs. Baker?" The objection then was made that the answers of Mrs. Baker (the assured) to the questions were written definitely, and it seemed to be the purpose of the question to vary the written answer, which formed a part of the written contract in this case.

This exception, we maintain, was a good one, and the following cases establish it to be so, viz.:

Campbell *vs.* The New England Mut. Life, 98 Mass., 381.

Vose *vs.* The Eagle & Health Ins. Co., 6 Cushing, 42.

(See third Point and authorities cited.)

(*a*) The parties, by their own express agreement, have made the policy and application a warrantry of the truth of the answers.

Lothian *vs.* Henderson, 3 B. & P., 499.

Snyder *vs.* Farmers' Ins. & Loan Co., 13 Wend., 92.

Jennings *vs.* Chenango Co.'s Mutual Ins., 2 Denio, 75.

(*b*) The answers contained in the application, regarded as mere representations, avoid the policy, concerning as they do material facts, and not being substantially true, nor made in good faith, both of which requisites must concur in order to support the policy.

McDowall *vs.* Frasier, Doug., 260.

Lynch *vs.* Dansford, 14 East, 494.

Vandenheuvel *vs.* United Ins. Co., 2 Johns. Cases, 127.

Vandenheuvel *vs.* Church, 2 Johns. Cases, note 173.

Stetson *vs.* Mass. Mut. F. Ins. Co., 4 Mass., 330, 337.

Hoyt *vs.* Gillman, 8 Mass., 336.

Curry *vs.* Commonwealth Ins. Co., 10 Pick., 535.

Bryant *vs.* Ocean Ins. Co., 22 Pick., 200.

Kohne *vs.* Ins. Co., 1 Wash. C. C., 158.

Baxter *vs.* N. E. Ins. Co., 3 Mass., 96.

Carpenter *vs.* Am. Ins. Co., 1 Story, 57.

Columbian Ins. Co. *vs.* Lawrence, 2 Peters, 25.

(*c*) The fact that the defendant's medical examiner knew, or had reasonable cause to believe, that the assured stated that she had two or three brothers who had been reported to have died of pulmonary consumption, but that there was a difference of opinion respect-

ing that, &c., &c., fol. 45, controls or varies the written contract of the parties, and should not have been admitted.

Higginson *vs.* Dall, 13 Mass., 96.
Wiggin *vs.* Boardman, 14 Mass., 12.
Parks *vs.* General Interest Ass'n Co., 5 Pick. 34.
Jennings *vs.* Chenango Mut. Ins. Co., 2 Denio, 75.
Atherton *vs.* Brown, 14 Mass., 162.
Weston *vs.* Emes, 1 Taunt., 115.
Flum *vs.* Tobin, 1 Moody & Ma., 367.
Vandervoort *vs.* Columbian Ins. Co., 3 Johns. Cases, 137.

(*d*) These representations were material, in the judgment of the insurer.

Valton *vs.* The National Life, 20 N. Y. Reps., 32.
Campbell *vs.* New England Mutual Life Ins. Co., 98 Mass., 381.

VII.—The case of the present defendant in error, appellant, against the Home Life Insurance Co., respondent, which was a case on appeal from a trial which took place at the Livingston Circuit, N. Y. State, in January, 1873, before his Honor Mr. Justice Dwight and a jury. At the close of the testimony, the defendant's counsel in that suit moved the Court to nonsuit; also to direct the jury to find a verdict for the defendant, on the ground that Mrs. Baker's (the assured's)

answers to certain questions, similar in terms to questions 7, 12, and 16, in this case, were untrue.

The Court granted a motion for nonsuit, on the ground that the undisputed evidence in that case showed a breach of warranty in respect to a question (No. 20) in that case, similar in terms and language to No 12 in this case.

Mr. Baker's counsel in that case excepted to the ruling of the Court in granting a nonsuit, whereupon the Court ordered the exceptions to be heard in the first instance at the General Term.

The General Term of the Fourth Department ordered judgment against Baker on the exceptions, from which appeal was taken to the Court of Appeals, which latter Court affirmed the nonsuit (see opinion as reported in 5 Insurance Law Journal, p. 661).

Now the Court of Appeals have established in a cognate case to the present, commenced by the present defendant in error, to recover the amount of a policy on the life of his wife, the assured in this case, that an answer which was untrue, given to a question in terms like qnestion 12 in this case, on the application for insurance, was a warranty, and being false vitiated the policy; and that the Court at Circuit, on the trial, were right in ordering a nonsuit or in directing a verdict for the Insurance Company. That being a decision of the highest court of New York State, is a high authority in this case upon the exception to the refusal of the Court below to order a verdict in favor of the plaintiffs in error below.

VIII.—The verdict was against the weight of evidence, and should be set aside, and judgment rendered thereon reversed.

Lastly.—We claim that the judgment below should be reversed and a new trial ordered—costs to abide event.

DENNIS McMAHON,

Attorney for Plff. in Error, also of Counsel.

U. S. Supreme Court.

The New Jersey Mutual
Life Insurance Company,
Plaintiffs in Error,

vs.

Anson M. Baker,
Defendant in Error.

Briefs for Defendant in Error.

A. M. BINGHAM and
E. G. LAPHAM,
Of Counsel for Defendant in Error.

U. S. Supreme Court.

The New Jersey Mutual
Life Insurance Company,
Plaintiffs in Error,

vs.

Anson M. Baker,
Defendant in Error.

Brief in behalf of Defendant in Error.

Statement of Facts.

The defendant in error and his wife, Martha C. Baker, obtained a policy of insurance upon their joint lives payable to the survivor of them in ninety days after due notice and proof of the death of the said party or parties. Said policy was dated June, 28th, 1869.

Record, folio 6. The facts stated in the complaint, are admitted by the answer, folio 19.

The application for said policy was made the 18th day of June 1869. Record, folios 20 and 54. And Martha C. Baker died December 6th, 1870. Record folio 7.

The action was removed from the State courts in New York to the Circuit court of the United States for the Northern District of N. Y., and came on for trial before the Hon. Lewis B. Woodruff, on the 15th day of October, 1873.

The application for insurance was filled out and prepared by one W. R. Wells, the agent of the company, and a physician and surgeon, and Martha C. Baker was examined by the examining physician of the company, one G. C. Hibbard, in the presence of the said agent, Dr. Wells. Record, folios 43, 44 and 45. On such examination the examining physician made certain inquiries about the family, which were in the form of questions prepared by the company to be answered by the physician, and were so answered by the physician.

The defendant in error offered to show upon the trial by the examining physician what was said by Mrs. Baker, in answer to certain questions which were propounded to her on such examination by Dr. Hibbard. The testimony was allowed by the court, and the plaintiff in error excepted, upon the ground that the object seemed to be to contradict the written declaration of Mrs. Baker. Record folio 44. And to the question as to what was said by the parties on that occasion the plaintiff in error objected that the question sought to contra-

dict the written contract. The objection was overruled and the testimony admitted.

These exceptions as to what occurred before the examining physician constitute the 1st class of objections raised by plaintiff in error.

The defendant in error was allowed to show the statements made to the agent Dr. Wells, by Mrs. Baker at the time he took her application for insurance; there was testimony tending to show that Dr. Wells, the agent, undertook to prepare the applicatian for insurance. And after a full statement by the appliant of all that was known by her in answer to each question, the agent wrote down the answers as he thought they should be, directed how they should be written and explained the meaning of the questions; to the admission of which testimony the plaintiff in error objected, but the same was received by the court.

Exceptions to this class of evidence constitute the 2d ground of objections and exceptions raised by the plaintiff in error. Record, folios 45 to 48 inclusive.

The plaintiffs in error at the close of the testimony requested the court to direct a verdict for the defendant, on the following grounds:

1st, that there was a violation of one of the express warranties to wit, the 22d question in the application, which was as follows:

"The name and residence of the parties usual medical "attendant, or of the medical attendant of the family to

"be referred to for information as to her health." To which the written answer was, "Has none."

2d, In regard to question No. 7,

"What members of the party's family, parents, brothers, sisters or children, have died of or been afflicted with pulminary consumption, insanity, epilepsy, disease of heart, scrofula, or any other hereditary disease?" To which the answer was written, "I know of none."

The request to direct a verdict was overruled, and forms the third and only other class of exceptions made in this case. Record, folios 68 and 69.

Testimony was given upon the trial tending to prove and there was substantially no dispute of the following facts:

Martha C. Baker was a daughter of Federal Dana, who was, at the time of the trial, over eighty years of age; his family consisted of eleven children, the mother and five children had died at the time of making of the application.

The mother died from the premature birth of her 12th child. Record Fol.67. William L. Dana died of consumption in Milwaukee, Wisconsin, where he had been a resident for twenty years. Record, folio 66 and 67.

Edward Dana died suddenly in the State of Florida, cause unknown.

Mrs. Keith, a sister died of typhoid fever. Mrs. Clapp, of fever. A younger sister from female difficulties. Mrs. Cookinham was unwell at the time and died

the next year after the application was made. Record folio 66 and 67.

All the knowledge which Mrs. Martha C. Baker had of the disease which had afflicted the family of her father, was fully communicated to the agent, Wells, and the examining physician. Folio 67. The answers to all questions were framed by the agent and were correct under his explanation of what the questions meant. Record folio 46 to 49, inclusive. Baker and his wife left Nelson, Madison County, and removed to Mount Morris, Livingston County, in the spring of 1868, a distance of about 200 miles. They had never employed or consulted a physician in their family since removing to Mount Morris. Record folio 49.

A letter was introduced to show that in the winter of 1870, about nine months after the application was made, Mrs. Baker wrote a letter to Dr. Greenwood, of Madison County, asking advice.

In answer to the question No. 22. "Name and residence of the parties usual medical attendant or of the medical attendant of the family to be referred to as to her health, to which the answer was written, "have none." Mrs. Baker informed the agent that she had moved away from her old home and it was not possible for them to employ a physician there, and that they had formerly employed different physicians, but never regarded any as their family physician, and since removing to Mount Morris had not employed or consulted a phys-

ician. The agent with this information, wrote the answer "have none." Record folio 49.

Other testimony was given tending to show that the applicants had little means of information concerning the diseases which had afflicted the family of Federal Dana, and that what they knew and had heard was fully communicated to the agent, Dr. Wells, who had solicited the application from the parties, and undertook the whole business of preparing the application and procuring the insurance.

POINTS.

1st. The first exception made by plaintiffs in error, is to the admission of the testimony of Dr. G. C. Hibbard as to what occured at the time of his examination of Mrs. Baker upon her application for insurance.

Dr. Hibbard was the examining physician of the company upon applications for life insurance. He was called upon by Dr. Wells, the agent of the company, for procuring applications for insurance to examine Mrs. Baker upon an application for such insurance. One of the questions required to be answered by the examining physician was the following:

"Have the parties parents, brothers, or sisters been afflicted with pulmonary or other diseases hereditary in their nature?"

To which the answer of the physician was written "no". Record folio 44.

The question was then asked the witness (Dr. Hibbard) by counsel for defendant in error as follows:

Question. "When this question was reached in the examination, will you state what conversation took place between you and Dr. Wells and Mrs. Baker?"

Plaintiff in error objected on the ground that the answer of Mrs. Baker to the question was written definitely and it seemed to be the purpose of the question to vary the written answer.

The Court overruled the objection, and plaintiff in error excepted. Folio 46.

It seems very clear that there was no error in allowing the physician of the company to testify as to what information was furnished him, and also at the same time to Dr. Wells, the agent for procuring insurance applications by these parties, while the physician in the presence, and at the request of the Company's agent, made the medical examination of the parties.

The answer to the question was the answer of the medical examiner, for which Mrs. Baker was in no way responsible, and could not be estoped from showing what information was communicated to the physician by any answer which the physician might make to a question asked him by the company; she answered correctly, and the physician, as he states, took the responsponsibility of writing the answer as he though proper. Record folio 63. Neither did the evidence of Mrs. Baker's declarations upon the medical examination tend to vary the answer of the physician. They showed the

sources of his information only. The rule which prohibits parol testimony to contradict or vary the terms of a written instrument, as a general rule extends only to the parties to such instrument.

Barry vs Ransom, 12 N. Y. (2 Ker.) 462.

Overseers of the poor of New Berlin vs Overseers of the poor of Norwick, 10 Johns, N. Y. Rep. 229.

Hogle vs Guardian Life Ins Co., 6 Robt. N. Y. Sup. Court 567.

Neither the defendant in error or Mrs. Baker the applicant for insurance, were parties to the questions of the company put to the examining physician, and answered by him upon his own responsibility.

But the answer of the defendant's in the action, sets up a fraudulent concealment of facts in reference to the very subject about which Dr. Hibbard was called upon to testify, and the question of a fraudulent concealment of facts was the only issue raised by the pleadings in the case, as we understand the meaning of the answer in this action. Record folios 19 and 22.

No one will deny but that this testimony in reference to the information furnished by Mrs. Baker, to the agent of the company, was very material and pertinent upon this issue of the fraudulent concealment of material facts in reference to the health of her relatives, and the diseases with which they had been afflicted.

But it is now as fully settled as it can be, that when an agent for procuring applications for insurance undertakes to prepare the application and to give instructions as to

how answers should be framed, as the agent did in this case. (See Record folio 47 and 48) Any information furnished such agent by the applicant for insurance or by other parties is proper to be shown upon the trial.

In the case of Miller vs The Mutual Benefit Insurance company, 31 Iowa 216, the question was asked, if the party had always been sober and temperate in his habits? the answer was, "yes." The application contained an agreement that the answer to the preceding questions should form the basis of a contract for insurance, and that any untrue or fradulent statement therein should vitiate the policy.

The friends statement did not contain an answer to the question as to whether the applicant had always been sober and temperate, but he informed the agent that he could not answer that question in the affirmative, that the insured had not always been sober and temperate.

The court held the testimony proper, that the company were chargable with the knowledge of the intemperate habits of the assured, and were estoped from setting up such intemperance as a breach of the agreement. See authorities cited under the 2d point herein.

Second. The second class of exceptions forming the 2d and 3d exceptions made by plaintiffs in error were interposed to the testimony of the plaintiff in the action when called upon to state what took place at the time the application for insurance was made out. It had

sources of his information only. The rule which prohibits parol testimony to contradict or vary the terms of a written instrument, as a general rule extends only to the parties to such instrument.

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Overseers of the poor of New Berlin vs Overseers of the poor of Norwick, 10 Johns, N. Y. Rep. 229.

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But the answer of the defendant's in the action, sets up a fraudulent concealment of facts in reference to the very subject about which Dr. Hibbard was called upon to testify, and the question of a fraudulent concealment of facts was the only issue raised by the pleadings in the case, as we understand the meaning of the answer in this action. Record folios 19 and 22.

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The court held the testimony proper, that the company were chargable with the knowledge of the intemperate habits of the assured, and were estoped from setting up such intemperance as a breach of the agreement. See authorities cited under the 2d point herein.

Second. The second class of exceptions forming the 2d and 3d exceptions made by plaintiffs in error were interposed to the testimony of the plaintiff in the action when called upon to state what took place at the time the application for insurance was made out. It had

previously been shown as before stated that the agent of the company undertook to prepare the application for insurance and did prepare it; that he instructed the parties as to the meaning of questions and also as to how the answers should be framed. The company were thereby bound by the information furnished to the agent, and if the answers were erroneous it was the fault of the company and not of the insured, and it was proper to show what information was furnished the company at the time the application for insurance was made out.

There was some dispute in the testimony as to whether the applicant for insurance had any knowledge of how the answers were written. Baker testifies that he was present and did not have any information as to how the answers were written. Record, folio 47. And the agent testifies that he read over the questions and answers to the applicant. Folio 49.

But this is unimportant so long as the agent undertook to prepare the application and to give instruction in reference to the meaning of questions and the proper form of the answers thereto. So this court have expressly held in the case of

Insurance company vs Mahone, 21 Wall. 152.

In this case the 5th question in the application was the following:

"Is the party temperate and regular in his habits?"

Answer, "Yes."

Question No. 16 was as follows:

"Is the party aware that any untrue or fraudulent "answer to the above questions, or any suppression of "facts in regard to health, habits or circumstances will "vitiate this policy ?

Answer, "Yes."

The plaintiff was allowed to prove that the answer to the 5th question was not "yes," but "I never refuse to take a drink," or "I always take my drinks." The testimony was excepted to and was held in this case to have been properly admitted. The Court says, page 156. "Nor do we think it makes any difference that the answers, as written by the agent, were subsequently read to Dillard and signed by him, having himself answered truly, and the agent having undertaken to prepare and forward the proposals, Dillard had a right to assume that the answers he did make were accepted as meaning for the purpose of obtaining a policy, what the agent stated them in writing to be." See also

Insurance Company vs Wilkinson, 13 Wall 222.

The Protective Ins. Co. vs Harmer, 2 Ohio St. R. 452.

N. J Inusurance Co. vs Schettler, 38 Ill. 168.

Rowley vs Empire Ins. Co., 36 N. Y. 550.

Clark vs. Union M. Ins. Co., 40 N. H. 333.

Hugh vs City Ins. Co., 29 Conn. 10.

Beale vs Park Ins. Co., 16 Wis. 241.

Miller vs The Mutual Benefit Life Ins. Co., *supra.*

3d. The fourth exception is made to the refusal of the court, to direct a verdict for the plaintiff. Fol. 6 9.

This motion to direct a verdict is made upon two grounds.

First, That there is evidence of a violation of the 22d question in the application which was as follows:

"The name and residence of the parties usual medical attendant, or of the medical attendant of the family, to be referred to for information as to her health," to which the answer was written, "has none."

Dr. Greenwood testified that when the family lived in Madison county, he was called to attend them at the birth of their first child, in the year 1855, and from that time onward, he had frequently called to see Mrs. Baker and her family, up to the time she removed to Mt. Morris in the spring of 1868. Fol. 50.

From the spring of '68 to the time of the application for insurance, June, 1869, no physician had been employed in the family, the parties having removed to Livingston county.

The assured explained to the agent that they had formerly employed different physicians in Madison county, but having removed 200 miles from there, it was not possible to employ them now. Fol. 49. With this explanation the agent of the company wrote down the answer, "have none."

The year following the making of the contract of insurance in 1870, Mrs. Baker wrote to Dr. Greenwood,

of Madison county, for advice. This letter was received in evidence against the objection of the defendant in error. We think this letter does not affect the answer in any way to this question, and also that the letter was improperly received.

Bond vs American M. L. Ins. Co., 27 N. Y. 282.

Fitch vs American Popular Life Ins. Co., 59 N. Y. 557.

The motion to direct a verdict on account of the answer to the 22d question, was properly denied. The object of the question asked is explained by the question itself, to be for the purpose of reference as to the health of the applicant.

The reference was for the purpose of ascertaining her health at the time of insurance; so it was understood by the agent and by the parties, and it was strictly true that the parties then had no usual medical attendant.

If the answer to the question is claimed to be a warranty, it is to be strictly construed, and could bear no other interpretation than to mean, who was then the medical attendant of the parties?

Hoffman vs. Ætna Fire Insurance Co. 32 N. Y. 405.

Rau vs. Home Insurance Co., 59, N. Y. 387.

Gould vs. York Co. M. F. Ins. Co. 47 Me. 403.

If the parties after their removal to Mt. Morris had employed a physician then it would manifestly have been improper for them to have named Dr. Greenwood as their usual medical attendant, for reference as to the

health of the assured; and such a reference might perhaps have avoided the contract, because the removal from their place of residence where Dr. Greenwood lived and practiced in their family, to a place distant two hundred miles, and the employment of another physician in the family, would have raised a presumption at least that the parties had abandoned Dr. Greenwood as their usual medical attendant; and if they had no occasion, after the removal, to employ a physician the removal at such a distance from the residence of their former physician, which rendered their employment of Dr. Greenwood a practical impossibility, was some evidence at least for the jury to consider whether Dr. Greenwood could then be regarded as the usual medical attendant of the family.

Under the answer therefore to the 22d question as it was written by the agent of the company, it was at least a question of fact for the jury as to whether the party had at that time a family physician.

Reed vs. Redmond & Arlington Life Ins. Co., 58 Mo. 421.

Gibson vs. American M. L. Ins. Co. 37 N. Y. 580.

Fitch vs the American Popular Life Ins. Co., 59 N. Y. 557.

But the correct answer to the 22d question in the position of the parties to this insurance would have been a puzzle to a lawyer, and the parties performed their

whole duty to the plaintiff in error, when they stated the facts to the agent, the truth of which statement as made by Mrs. Baker (Rec. folio 49,) has not been in any way questioned.

The parties to this insurance have thus thrown upon the company the whole responsibility of the answer to this question, and if there is any error committed by the answer it is the error of the company, and not of the assured.

Insurance Company vs. Mohone, *supra*.

The assured stated that she had employed different physicians, but had never regarded any as their family physician. No further questions were asked and the assured was not called upon to state further particulars. If the assured was honest in stating that they had never employed any one in particular as their family physician, the company could not avoid the policy; if the assured was erroneous in her views of what constituted a usual medical attendant, this whole question under the answer which was in fact given to the question relating to the usual medical attendant of the party, was one for the jury.

Malary vs. Travelers Ins. Co. 47, N. Y. 52.

Fitch vs. American Popular Life Ins. Co., *supra*.

But we do not understand that the answer sets up any breach of warranty, that the defense is based solely upon the claim of a fraudulent concealment of facts.

See answer folios 19 and 22.

If there was any concealment of facts in reference to any question asked by the company, the plaintiffs in error did not show it. The burthen of proof was with them, and a fraudulent concealment of facts can not be assumed. If the assured fairly answered the questions asked she was not required to make any further communication of facts.

Rawls vs. American M. Life Ins. Co. 27 N. Y. 282.

The plaintiff in error asked the court also to direct a verdict in favor of the defendant upon the trial on account of a breach of warranty in the answer to the 7th question, as to whether any member of the parties family had been afflicted with certain diseases. The answer was "I know of none." It is admitted that there is no proof that the assured had any knowledge of any disease which had afflicted her father's family, except what was fully communicated to the agent at the time of taking the application, (Rec. folio 67,) and this fact fully disposes of the point made by counsel for plaintiff in error on his motion asking the court to direct a verdict for the defendant at the trial, because the burthen of proof was with the company to show the falsity of any of the answers made by the assured.

Piedmont & Arlington L. Ins. Co. vs. Ewing Adm'ns 92 U. S. Sup. C. R. (2 Otto) 377.

Lastly we say in reference to the motion of plaintiff's counsel to direct a verdict, that the bill of exceptions does not claim to set out all of the testimony in the case, which would be material upon the questions raised

as to whether the court upon the whole testimony before it should have directed a verdict. This court has but a small portion of the facts before it, and is not therefore in a situation to ascertain whether the court below committed an error or not in its refusal to take the case from the jury.

Tioga R. R. vs Blossburgh & Corning R. R. 20 Wall 137.

Mays vs. Fritton 20 Wall. 414.

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